DALLAS C. QUALMAN ET AL.

IBLA 78-359 Decided July 25, 1978

Appeal from a decision of the Idaho State Office, Bureau of Land Management, dismissing the appellants' protest to the private land exchange application of Initial Butte Farms, Inc. I-12269.

Affirmed.

1. Res Judicata -- Rules of Practice: Appeals: Reconsideration

   A request to reconsider a final decision of the Department rejecting applications for homestead entry is properly rejected in the absence of a showing of extraordinary circumstances. Except where compelling legal and equitable reasons for reconsideration are shown, the principle of res judicata and its counterpart, finality of administrative action, will bar consideration of a new appeal arising from a later proceeding involving the same claim and the same issues.

2. Applications and Entries: Generally -- Homesteads (Ordinary): Lands Subject to -- Reclamation Homesteads: Generally -- Reclamation Lands: Generally -- Withdrawals and Reservations: Reclamation Withdrawals

   An application to make homestead entry on land embraced in a first form reclamation withdrawal is properly rejected.

3. Homesteads (Ordinary): Lands Subject to -- Homesteads (Ordinary): Settlement -- Reclamation Homesteads: Generally -- Reclamation Lands: Generally

No person shall be permitted to make homestead entry or settle upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage per entry and publicly announced the availability of water for irrigation.

APPEARANCES: Mike Wetherell, Esq., Boise, Idaho, for appellants.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

This appeal has been brought from a decision of the Idaho State Office, Bureau of Land Management (BLM), dismissing the protest of appellants 1/ to the proposed private land exchange of Initial Butte Farms, Inc., I-12269. The exchange application of Initial Butte Farms, originally filed pursuant to section 8(b) and (d) of the Taylor Grazing Act of June 28, 1934, 43 U.S.C. § 315g (1970) 2/ proposed to exchange certain lands owned by the applicant within the Smoke River Birds of Prey Natural Area for certain public lands.

The application was amended to come under the provisions of section 206(a) of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1716, and following determination that the proposed exchange would well serve the public interest, it was approved by BLM decision of October 25, 1977. The subject protest followed.

The decision below was based on a finding that appellants were trying to restate the claims to the land in the proposed exchange already made in support of their applications for homestead entry on the land filed in 1974. Those applications were rejected on the

1/ The parties to this appeal from dismissal of the protest are Dallas C. Qualman, Carl D. Qualman, Ronald R. Qualman, and Carol M. Qualman.

2/ Repealed, Federal Land Policy and Management Act of 1976, P.L. 94-579, § 705(a), 90 Stat. 2793. The exchange provisions of the Taylor Act have been superseded by section 206(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1716 (West Supp. 1977).

basis that the land was withdrawn, and that adjudication was affirmed on appeal. Carl D. Qualman, 18 IBLA 83 (1974), Petition for Reconsideration Denied (1975). 3/

Appellants assert in their statement of reasons for appeal that the 1974 decision rejecting the applications for homestead entry was in error and that appellants hold rights to the land as homestead entrymen which preclude exchange of the lands. Appellants allege the Board of Land Appeals may review and revoke its prior decision in Carl D. Qualman, supra, in the context of the present appeal. Appellants contend that the provisions of 43 U.S.C. § 436 (1970) to the effect that land reserved for irrigation purposes shall not be open to entry until certain specified conditions have been fulfilled should not be applied to bar their applications for homestead entry in view of the legislative intent to encourage homesteading. Appellants further argue that withdrawal for purposes of classification of the subject land pursuant to section 7 of the Taylor Grazing Act of June 28, 1934, as amended, 43 U.S.C. § 315f (1970) should not be held to bar appellants' applications for homestead entry. Their reasons are that appellants are qualified to make entry and the fact that the land is already in agricultural use makes it clear that the land should be classified as available for homestead entry.

Essentially the appellants, in the context of this appeal from the denial of their protest of the private exchange, are seeking reconsideration of the decisions rejecting their applications for homestead entry. The question raised is whether the appellants have presented any new evidence establishing compelling legal or equitable reasons for reconsideration.

[1] A request to reconsider a final decision of the Department regarding rejection of applications for homestead entry is properly rejected in the absence of a showing of extraordinary circumstances. 43 CFR 4.21(c). In the absence of compelling legal and equitable reasons for reconsideration, the principle of res judicata and its counterpart, finality of administrative action, will bar consideration of a new appeal arising from a later proceeding involving the same claim and the same issues. Pekka K. Merikallio, 30 IBLA 157 (1977).

Appellants have not alleged any evidence not considered in the prior appeals. Rather, their arguments are directed to the construction of section 3 of the Reclamation Act of June 17, 1902, 43 U.S.C.

3/ The rejection of Carol M. Qualman's application was affirmed on appeal for the same reasons in the case titled Richard E. Crill, 18 IBLA 428 (1975).

§ 416 (1970) (repealed 1976), as amended by Act of June 25, 1910, section 5, 43 U.S.C. § 436 (1970). Appellants argue that rejection of their homestead entry applications is inconsistent with the legislative intent to encourage homesteading.

Appellants do not dispute that the lands embraced in their homestead entry applications were withdrawn from public entry for the Mountain Home Reclamation Project by a first form reclamation withdrawal order dated January 28, 1952, pursuant to section 3 of the Act of June 17, 1902, 43 U.S.C. § 416 (1970) (repealed 1976). That section provides, in part, as follows:

> The Secretary of the Interior shall, before giving the public notice provided for in section 419 of this title, withdraw from public entry the lands required for any irrigation works contemplated * * * and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works * * *.

43 U.S.C. § 416 (1970) (repealed 1976).

[2, 3] Lands withdrawn as being required for construction and maintenance of irrigation works (commonly known as first form reclamation withdrawals, Instructions, 33 L.D. 607 (1905)) have always been held closed to entry while so withdrawn. 43 CFR 2322.1-1; Lewis M. Eslick, 24 IBLA 237 (1976); Richard E. Crill, 18 IBLA 428 (1975). Nevertheless, lands withdrawn as susceptible of irrigation in reclamation projects (commonly referred to as second form withdrawals) were initially subject to homestead entry under section 3 of the Act of June 17, 1902. However, all lands withdrawn for irrigation purposes are subject to the provisions of section 5 of the Act of June 25, 1910, as amended, 43 U.S.C. § 436 (1970):

> After June 25, 1910, no entry shall be made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage per entry, and water is ready to be delivered for the land in such unit or some part thereof and such fact has been announced by the Secretary of the Interior.

Appellants here do not contend that the Secretary of the Interior has either established the unit of acreage per entry or announced that water is ready to be delivered to the land in such unit. Section 5 of the Act of June 25, 1910, precluded further allowance of ordinary

homestead entries on lands withdrawn for reclamation projects, allowed only reclamation homestead entries to be made, and allowed such entries only after establishment of farm units and notice of availability of water for the land. Lewis M. Eslick, 24 IBLA 237, 238 (1976); Carl D. Qualman, supra at 86; see Solicitor's Opinion, M-36433 (April 12, 1957). As evidence that the statutory conditions have been met is lacking, the applications for homestead entry were properly rejected. 43 CFR 2091.1; see Clifford Prisbrey, 24 IBLA 108 (1976). Accordingly, appellants have not established any rights in the lands subject to the proposed private exchange which could preclude the exchange.

Appellants' statement of reasons has placed a great deal of emphasis upon the legislative intent. However, where the language of a statute is clear and unambiguous it must be held to mean what it states and external indicia of legislative intent become less important. 2A Sutherland, Statutory Construction, §§ 46.01, 46.04 (4th ed., 1973).

We adhere to the Board's earlier rulings affirming the rejection of protestants' applications to make homestead entry on the lands selected in exchange I 12269, and therefore we are constrained to hold that appellants have no cognizable interest in the subject land which can preclude consummation of the proposed exchange I 12269.

The homestead laws were repealed by section 702 of FLPMA, except as they might be applied to public lands in the State of Alaska. Although section 701(a) of the Act provided that nothing in the Act shall be construed as terminating any valid land use right or authorization existing on the date of approval of the Act, we have not been able to find such a valid right in any of the appellants.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Joseph W. Goss
Administrative Judge